BAIL SLIP

The 4th Accused Viz. Senthil Kumar, was ordered to be released on bail on 16.11.2005 as per order of this Court made in Crl.M.P.No.8782/2005 in CA.205/04.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

Criminal Appeal No.205 of 2004

1. Sathish
2. Raji
3. Mark Anthony
4. Senthil Kumar .. Appellants

Vs.

State rep. by Inspector of Police
K-6, T.P.Chatram Police Station
Chennai. .. Respondent

Appeal under Section 374 of Criminal Procedure Code against the judgment dated 30.12.2003 made in S.C.No.205 of 2003 on the file of learned Additional District and Sessions Judge (Fast Track Court No.II), Chennai convicting the Appellants under Section 302, 326 and 324 IPC and sentenced them to undergo imprisonment for life with a total fine of Rs.28,000/-.

For Appellants : Mr.R.Gopinath, S.C.
Mr.L. Mahendran and
Mr.S.Suresh (A1 and A2)
Mr.M.Sathish Kumar (A3)
Mr.E.M.K.Yashwanth Rao (A4)

For Respondent : Mr.C.T.Selvam
Addl. Public Prosecutor

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J U D G M E N T

(Delivered by P.D.DINAKARAN,J.)

The appeal is directed against the judgment dated 30.12.2003 made in Sessions Case No.205 of 2003 on the file of the learned Additional District and Sessions Judge (Fast Track Court No.II), Chennai, whereunder the appellants herein were tried along with three other accused namely A5

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to A7 therein and convicted and sentenced as mentioned below.

1.1. A1 to A6 were charged for the offence punishable under Sections 120(B), 147, 148, 324, 326, 307 and 302 IPC and A7 was charged for the offence punishable under Section 120(B) IPC, in connection with the occurrence said to have taken place at about 10.15 p.m. on 29.8.1999 in front of Indian Wines shop at Link Road, within the jurisdiction of respondent Police Station, Chennai, for having said to have murdered one Udaya @ Udayaprakash.

2.1. The prosecution case rests upon the statement given by P.W.1 at about 11.45 pm on 29.8.1999, marked as Ex.P1. Based on the said statement, Ex.P1, a First Information Report, Ex.P23 was registered by the Inspector of Police, P.W.21 on 29.8.1999.

2.2. According to the prosecution, on 17.8.1999, there was a wordy quarrel between P.W.1 to P.W.3 and the deceased of M.S.Nagar and A1 to A7 of Mangalapuram, while playing carrom in 7th Street, Mangalapuram, Chetpet, with respect to which, a complaint was lodged by one Surendran in the Chetpet Police Station. Again, on 18.8.1999, there was a quarrel between both the parties at Ambedkar ground, Chetpet and a complaint was lodged by one Manimaran. In view of the above, there was an enmity between both the parties.

2.3. Apprehending danger to their lives at the hands of A7, who is a big rowdy, P.Ws.1, 2 and the deceased stayed in the house of P.W.3 at T.P.Chathiram. On 29.8.1999, at about 10.15 pm, when P.Ws.1 to 3 and the deceased went to Indian Wines shop at Shenoy Nagar to purchase brandy, A1 to A4 along with two unknown persons, armed with patta knives, came in two autorickshaws. On seeing them, P.Ws.1 to 3 and the deceased tried to escape from the place. But, A1 to A4 and the two unknown persons, surrounded P.Ws.1 to 3 and the deceased.

2.4. A1 cut P.W.1 on his left leg with patta knife. A2 cut P.W.2 on his right thumb and wrist. A1 cut P.W.2 with patta knife on his left wrist and left thumb. A3 cut P.W.3 on his head. A4 cut the deceased on his left ear and left hand. The two unknown persons stabbed the deceased on his stomach with the patta knives. A1 and A3 severed the left thumb of P.W.3. A1 and A3 also cut P.W.3 on his right hand and head.

2.5. The public, who gathered at the place of occurrence on hearing the hue and cry, were threatened by the accused by showing the patta knives. A3 cut two people who were in the wine shop. A1 hurled a bottle on the road. Thereafter, they ran away from the scene of occurrence.

2.6. P.W.1 gave a statement, Ex.P1 to the Inspector of Police, P.W.21. F.I.R. was registered on 29.8.1999 at about 11.45 pm on the file of K6, T.P. Chatiram Police Station, which was marked as Ex.P23.

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2.7. The investigating officer, P.W.21, on the basis of the F.I.R., Ex.P23, undertook the investigation, visited the place of occurrence in the early hours of 30.8.1999, prepared an Observation Mahazar, Ex.P24 and a Rough Sketch, Ex.P25, recovered material objects from the scene of occurrence viz., M.Os.18 to 21 - one thumb, blood stained cement flooring, sample cement flooring, and bottle pieces respectively under seizure mahazar, Ex.P26. The blood stained dresses, MO7 to MO16, worn by P.Ws.1 to 4 and the deceased were seized under Mahazar Exs.P16 to P19. Two petrol bombs, MO2 and six blood stained patta knives, MO1 and MO22 series were seized from the house of A7 under Mahazar, Ex.P27. Two autorickshaws, MO5 and MO6, in which the accused came to the scene of occurence were seized under Mahazar, Ex.P28. A1 was arrested on 30.8.1999. Based on his confession statement, A2 to A7 were arrested at the residence of A7.

2.8. P.W.8 is the Doctor who examined P.Ws.1, 2 and the deceased and issued Accident Register Extracts, Exs.P6, P4 and P5 respectively. P.W.6 is the Doctor who examined P.W.3 and issued wound certificate, Ex.P2 stating that the injuries are grievous in nature. P.W.7 is the Doctor who examined P.W.4 and issued wound certificate, Ex.P3 stating that the injuries sustained by P.W.4 are simple.

2.9. P.W.9 is the Doctor, who conducted post mortem at 12.45 pm on 30.8.1999 and found 10 external injuries, as certified in the Post Mortem Certificate, Ex.P9, opined that the deceased would have died due to multiple injuries.

2.10. On 3.9.1999, the material objects were forwarded for chemical analysis through the Court and chemical analyst's report is Ex.P30. Serologist's report is Ex.P9.

2.11. After completing the investigation, the Inspector of Police, P.W.21, filed the charge sheet on 28.4.2000.

2.12. Since the accused denied the charges framed against them, they were tried in Sessions Case No.205 of 2003 before the learned Additional District and Sessions Judge (Fast Track Court No.II), Chennai.

3.1. On behalf of the prosecution, 23 witnesses were examined as P.Ws.1 to 23 and marked Exs.P1 to P32 and M.Os.1 to 22. P.Ws.1 to 5 are injured eye witnesses.

3.2. P.W.1 speaks about the presence of all the accused and overt acts on himself, P.Ws.2, 3 and the deceased, attributed to A1, A2, A3; P.W.2 also speaks about the presence of all the accused and the overt acts of A1 and A2; P.W.3 though speaks about the incident, did not specify the names of the accused; P.W.4 speaks about the incident, but mentions the scene of occurrence at different place; even though P.W.5 speaks about the

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incident, his evidence was disbelieved by the trial Court.

4. When the accused were questioned under Section 313 Cr.P.C. as to the incriminating circumstances found against them in the evidence of prosecution witnesses, they denied the same. The accused have neither examined any witness, nor marked any document on their behalf.

5. The learned Additional District and Sessions Judge (Fast Track Court No.II), Chennai, after appreciating the evidence on record and finding that only A1 to A4 were present in the scene of occurrence, acquitted A7 of the charge under section 120B and A5 and A6 of the charges under Sections 120(B), 147, 148, 324, 326, 307 and 302 IPC and convicted (i) A1 for the offence punishable under Sections 324, 326 (2 counts) and 302 IPC and sentenced him to undergo imprisonment for 3 years and 7 years, with a fine of Rs.2,000/- (on each count), in default, to undergo three months imprisonment on each count and imprisonment for life with a fine of Rs.5,000/-, in default, to undergo imprisonment for six months respectively; (ii) A2 under sections 326 and 302 IPC and sentenced to undergo rigorous imprisonment for seven years with a fine of Rs.2,000/-, in default, imprisonment for three months and imprisonment for life with a fine of Rs.5,000/-, in default, to undergo imprisonment for six months respectively; (iii) A3 under Sections 326 and 302 IPC and sentenced to undergo rigorous imprisonment for seven years with a fine of Rs.2,000/-, in default, imprisonment for three months and imprisonment for life with a fine of Rs.5,000/-, in default, to undergo imprisonment for six months respectively; and (iv) A4 under section 302, IPC and sentenced to imprisonment for life with a fine of Rs.Rs.5,000/-, in default, to undergo imprisonment for six months. Hence, the above appeal.

6. Learned counsel appearing on behalf of the accused took us to the whole evidence and contended that the prosecution had not been able to establish that it was A1 to A4 who committed the murder of the deceased Udhaya @ Udhayaprakash. According to him, when the benefit of doubt is extended to A5 and A6, the same benefit should be extended to other accused also (appellants). He has submitted that the circumstances emerging out of the evidence were too insignificant to connect the accused with other offences under which A1 to A3 were convicted.

7. On the other hand, sustaining the conviction and sentence imposed by the trial Court, learned Additional Public Prosecutor submitted that the prosecution has proved the guilt of the appellants/accused for the offences with which they are convicted.

8. The point for determination in this appeal is, whether the Sessions Judge was right in holding that the prosecution has proved the guilt of the accused beyond reasonable doubts.

9.1. The gravamen of the prosecution case is that A1 to A6, who were the hooligans acting for and on behalf of A7, due to the prior enmity in

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playing carrom board, entered into a criminal conspiracy in the residence of A7 to murder the deceased Udhaya @ Udhayaprakash and in furtherance of the said conspiracy, on 29.8.1999 at 10.15 p.m., in front of Indian Wine Shop, No.10B, Link Road, T.P. Chatram, at the instance of A7, attacked the deceased Udhaya @ Udhayaprakash and caused his death. It is also the case of the prosecution that A1 to A6 attacked P.Ws.1 to 5 and caused injuries to them.

9.2. It is not in dispute that there were two groups of rowdy elements, one led by A7 and the other led by the deceased Udhaya @ Udhayaprakash and there was prior enmity between the two groups in playing carrom. The evidence of P.Ws.1, 2 and 5 that there was a wordy quarrel between the accused party and the witness party in playing carrom remain unshaken.

10.1. Now, coming to the conviction of the accused, the trial Court convicted A1 under sections 324, 326 (2 counts) and 302 IPC, A2 and A3 under sections 326 and 302 IPC, A4 under section 302 IPC. The prosecution rested on the evidence of P.W.1, P.W.2 and P.W.5, injured witnesses. Though P.Ws.3 and 4 are alleged to have sustained injuries in the occurrence and medical evidence also corroborated the same, yet, they have not specified the overt acts attributed to each of the accused and hence, their evidence are not helpful.

10.2. Regarding the conviction under section 302 IPC, though charge under section 302 IPC was framed against each of the accused, viz. A1 to A6, the trial Court found the charge under section 302 IPC proved as against A1 to A4. The trial Court came to the conclusion that the charge under section 302 IPC remained not proved as against A5 and A6.

10.3. To prove the charge under section 302 IPC against A1 to A4, the trial Court relied upon the evidence of P.Ws.1,2 and 5 besides medical evidence. P.W.8 doctor treated the deceased Udhaya @ Udhayaprakash who was brought to the hospital for the injuries allegedly sustained by the attack made by six known persons. P.W.8 found the deceased unconscious. He also found cut injuries on his right knee, left forehead, left thigh and left wrist. He also found cut injuries on his head, right thigh and left knee. For the said injuries on the deceased, he issued Ex.P5, accident register extract. He referred the deceased to the Government General Hospital for further treatment where the deceased was declared dead by the doctor, P.W.11. P.W.9, doctor who conducted autopsy over the dead body of the deceased, found ten external injuries almost all over the body. Most of them are cut injuries. P.W.9 opined that the deceased would appear to have died due to the injuries sustained by him. It is therefore evident from the deposition of P.Ws.8 and 9 that the deceased Udhaya @ Udhayaprakash was indiscriminately attacked by more than one person and due to the injuries sustained by him, he died, in spite of the treatment given to him.

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10.4. Next, we have to examine whether A1 to A6 are the persons who attacked the deceased and they are responsible for the death of the deceased. In the complaint, Ex.P1 given by P.W.1, it is stated that A1 to A4, along with other two unknown persons armed with knives, came in two autorickshaws and attacked P.Ws.1 to 3 and the deceased, from which, it is evident that P.Ws.1 to 3 were present at the time of occurrence. Though P.W.5 claimed that he saw A1 to A6 armed with knives boarding autorickshaws and that he witnessed the occurrence, in the first information report, Ex.P1 there is no mention about the presence of P.W.5 in the scene of occurrence. Further, though P.W.5, in his chief examination, has stated that he heard the accused party saying that only after the death of Udhaya (deceased), the Chetpet area would be secured, in his cross-examination he has stated that he did not inform the same either to the police, or to the public or to the persons who were present at P.W.3's house when he immediately visited there. Hence, the trial Court has rightly discarded the evidence of P.W.5.

10.5. P.W.1, in his evidence, has stated that A2 cut the deceased on his right knee, whereas P.W.2 has deposed that A1 to A6 cut the deceased indiscriminately. Even though in Ex.P1 complaint, the names of A1 to A4 are found mentioned, P.W.1 has given evidence specifying the name of A2 stating that A2 cut the deceased. P.W.2 in his evidence has only stated that A1 to A6 cut the deceased indiscriminately and his evidence does not specifically attribute the overt acts to a particular accused.

10.6. The trial Court based on Ex.P1 wherein the names of A1 to A4 were mentioned and the evidence of P.W.22 doctor who has stated that P.W.2 informed him that he was attacked by four known persons, convicted A1 to A4 under section 302 IPC for the death of deceased Udhaya @ Udhayaprakash. But, the approach of trial Court is not appreciable, as, except P.Ws.1 and 2, there is no other witness to speak about the attack on the deceased. Among the two, P.W.1, in his chief examination, has specifically implicated A2 in the attack on the deceased, but in cross-examination he has stated that A1 to A6 indiscriminately cut the deceased. As already noticed, it is the evidence of P.W.2 that A1 to A6 indiscriminately attacked the deceased. Therefore, when there is no evidence roping in a particular accused in the attack on the deceased, it is not safe to convict A1 to A4 also under section 302 IPC for the death of the deceased.

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10.7. It is pertinent to note that the trial Court discharged A5 and A6 from the charge of murder giving the benefit of doubt on the basis that their names were not mentioned in Ex.P1, complaint and that the prosecution witnesses have not stated that A5 and A6 attacked the deceased. We find substance in the submission of learned counsel for the appellants that when the trial Court extended the benefit of doubt to A5 and A6, the same benefit should also be extended to other accused. It is a settled proposition in criminal jurisprudence that eye-witnesses having been disbelieved partly, resulting in acquittal of the co-accused, it

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would not be safe to believe them qua other accused and other accused are also entitled to the benefit of doubt and acquittal [vide: Lakkappa Ningappa Ittappannavar v. State of Karnataka, 1993Supp (2) SCC 755]. In the instant case, there is no cogent and convincing evidence by any of the prosecution witnesses specifically attributing the overt acts to each of the accused. Under such circumstances, we hold that A1 to A4 are also entitled to the benefit of reasonable doubt in respect of the murder of the deceased and accordingly, they are discharged from the charge under section 302 IPC.

10.8. Now, let us consider the conviction under section 326 IPC against A1 to A3. The trial Court recorded its finding on the basis of the evidence of P.Ws.1 to 3, injured witnesses. The trial Court found A1 guilty under section 326 IPC (2 counts) in respect of injuries caused by him to P.Ws.1 and 3. P.W.1, in his evidence, has stated that A1 cut him on his left leg. P.W.8 doctor, who examined P.W.1, found an incised wound, 5 x 2 cm. in size on his left ankle. It is his evidence that bones were found protruding. P.W.10 doctor, who treated P.W.1, in his evidence, has stated that there was a fracture on his left leg and issued Ex.P11 wound certificate opining that it was a grievous injury. The above facts would reveal that A1 had inflicted a grievous injury on P.W.1 explicitly implicating him for the offence under section 326 IPC.

10.9. The trial Court also based its conviction on A1 under section 326 for the injury on P.W.3. It is the prosecution case that P.W.3 sustained injuries on his hands and head. Though P.W.3 in his evidence has stated that he was attacked by a mob, the evidence of P.W.1 is clear that A1 cut P.W.3 on his left thumb. The above statement is corroborated with the evidence of the doctor P.W.6 who deposed that he did not find the left thumb of P.W.3, at the time of examination. P.W.11 doctor also treated P.W.3. According to the medical evidence the above injury is grievous in nature. Further, the severed thumb was seized under mahazar, Ex.P26. Hence, we are of the view that the trial Court is justified in convicting A1 under section 326 IPC for the grievous injury sustained by P.W.3.

10.10. So far as P.W.3 is concerned, it is the case of the prosecution that A3 also inflicted injury on him. The trial Court rendered its finding that A3 cut P.W.3 on the basis of evidence of P.Ws.1 and 3. As already observed, P.W.3 has not stated anything as to who had inflicted injury on him, but from the evidence of P.W.3 it is deducible that he sustained injuries on his hands and head. On the other hand, P.W.1 in his evidence has stated that P.W.3 was also attacked by A3. The doctor P.W.6, who examined P.W.3, found injury on his right hand and opined that the said injury is grievous in nature. Hence, we hold that the trial Court has correctly convicted A3 under section 326 IPC for the injury sustained by P.W.3.

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10.11. As regards A2, the prosecution claimed that he caused injuries on P.W.2. P.W.2 in his evidence has stated that A2 cut him on his right index finger, which is corroborated with the evidence of P.W.1. The medical evidence, viz., P.W.8 doctor, is to the effect that there was fracture in the right index finger of P.W.2. Ex.P4 is the accident register extract issued in respect of P.W.2 showing that there was a fracture in the right index finger of P.W.2. We are, therefore, of the view that the trial
Court was correct in convicting A2 under section 326 IPC for the injuries sustained by P.W.2.

10.12. However, learned counsel appearing for the appellants contended that P.W.3 in his evidence has not stated as to who attacked him and though the other injured witnesses P.Ws.1 and 2 have attributed specific overt acts in respect of injuries on P.Ws.1 to 3 to A1 to A3, in the absence of corroboration by P.W.3, it is not safe to convict A1 to A3 for the offence under section 326 IPC. We are unable to accept the above contention, because, it would be practically impossible for any injured witness to exactly notice and memorise which accused was causing injuries on him and if any such statement is made, it may amount to an exaggeration because when a number of assailants are there, injuries are not inflicted in a manner which could be exactly noted by the witnesses [vide: State of Rajasthan v. Major Singh (1999) 9 SCC 106].

10.13. The trial Court found A1 guilty under section 324 IPC for the injury on the left wrist of P.W.1. But, P.W.2 has only stated that A1 caused injury on his left leg. Further, the doctors (P.Ws.8 and 11) who gave treatment to P.W.1 have not found any such injury on P.W.1. Exs.P6 and Ex.P11 are also silent as to the injury on the left wrist. We, therefore, hold that there is no basis for the trial Court to base its conviction under section 324 IPC against A1 for the injury on left wrist of P.W.1. Accordingly, we hold that the prosecution has failed to prove the guilt of A1 under section 324 IPC for the injury on the left wrist of P.W.1.

10.14. As a result of the above discussion, we hold that the prosecution has only proved the guilt of A1 to A3 for the offence under section 326 IPC as follows:

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(i) 1st	accused	...	under Section 326 IPC (2 counts)
(ii) 2nd	accused	...	under Section 326 IPC
(iii) 3rd	accused	...	under Section 326 IPC

However, the prosecution has miserably failed to prove the guilt of A1 to A4 under section 302 IPC and the guilt of A1 under section 324 IPC.

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11. In the result, the conviction and sentence in respect of A4 under section 302 IPC, as recorded by the trial Court, are set aside; and the conviction and sentence of imprisonment alone in respect of A1 to A3 under section 302 IPC and that of A1 under section 324 IPC are also set aside. The conviction in respect of A1 to A3 under section 326 IPC, as stated above, are confirmed, however, considering the circumstances placed before us, A1 to A3 are each sentenced to undergo rigorous imprisonment for four (4) years, instead of seven years as awarded by the trial Court plus the fine amount as ordered by the trial Court. The fine amount imposed as against A1 to A3 under section 302 IPC shall be treated as fine amount under section 326 IPC, in addition to the fine already imposed. The sentence against A1 for two counts under section 326 IPC shall run concurrently. The period already undergone by A1 to A3 is ordered to be set off. The bail bond, if any, executed by A4 shall stand cancelled. Out of the fine amount imposed on the A1 to A3 under section 326 IPC, including the one originally imposed under section 302 IPC and subsequently treated as fine under section 326 IPC, a sum of Rs.10,000/- shall be paid to P.W.1 as compensation.

Accordingly, the appeal is partly allowed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

kpl/na

To

1.The Additional Sessions Judge,
(FTC II), Chennai.

2. The Prl. Sessions Judge, Chennai.

3. The II Metropolitan Magistrate, Egmore, Chennai.

4. -do- through the Chief Metropolitan Magistrate, Chennai.

5. The Superintendent, Central Prison, Chennai.

6. The Public Prosecutor, High Court, Madras.

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7. The Inspector of Police,
K-6, T.P.Chatram Police Station,
Chennai.

8. The Superintendent, Central Prison, Vellore.

9. The District Collector, Chennai.

10. The District Collector, Vellore.

11. The Director General of Police, Chennai 4.

+ 2 CCs to Mr.L.Mahendran, Advocate SR NO 44372

+ 1 CC To Mr. EMK Yaswant Rao, Advocate SR NO.43881

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